Nos. 13-15442, 13-16100

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL BENNETT; LINDA BENNETT,
as Co-Administrators of the Estate of Maria Ann Bennett,
Plaintiffs - Appellees,
v.
THE ISLAMIC REPUBLIC OF IRAN,
Defendant,
VISA, INC. and FRANKLIN RESOURCES, INC.,
Third Party Defendants - Appellees,
v.
GREENBERG AND ACOSTA JUDGEMENT CREDITORS AND HEISER JUDGMENT CREDITORS,
Third Party Defendants - Appellees,
and
BANK MELLI,
Third Party Defendants - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

Of Counsel:

LISA J. GROSH
Assistant Legal Advisor
Department of State

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

BRIAN STRETCH
Acting United States Attorney

SHARON SWINGLE
(202) 353-2689
BENJAMIN M. SHULTZ
(202) 514-3518
Attorneys, Appellate Staff
Civil Division, Room 7211
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

Legislative Material:

Other Authority:

INTRODUCTION

Pursuant to the Court's invitation, the United States submits this amicus brief to address several issues of importance to the government, related to the proper interpretation of 28 U.S.C. § 1610(g) and the Terrorism Risk Insurance Act (TRIA). In doing so, the United States emphatically condemns the terrorist actions that gave rise to this case, and expresses its deep sympathy for the victims. The United States is committed to aggressively pursuing those responsible for violence against U.S. nationals.

Under 28 U.S.C. § 1610(g), certain individuals holding judgments against state sponsors of terrorism may attach both "the property of" that state, and the "property of an agency or instrumentality of such a state," even if the property is held "in a separate juridical entity." 28 U.S.C. § 1610(g). Section 1610(g) additionally requires, however, that any such attachment must occur "as provided in this section"—that is, in accordance with the other requirements of section 1610.

In the United States's view, the import of section 1610(g) is clear. Because attachment must occur "as provided in this section," section 1610(g) is not a freestanding exception to foreign sovereign immunity; a plaintiff seeking execution must therefore proceed under one or more of

the exceptions to immunity separately set out in section 1610. But in evaluating whether a plaintiff meets any of those exceptions, section 1610(g) requires a court to do so without regard to the fact that the plaintiff may be seeking to satisfy a judgment against a foreign state by attaching the assets of its agency or instrumentality.

In this case, the United States understands the panel to have reached a result consistent with that understanding. Accordingly, we do not urge the Court to rehear the case en banc. At the same time, however, dicta from the panel's opinion might be misinterpreted as holding that section 1610(g) creates an independent exception to sovereign immunity, such that a plaintiff could attach the directly-held assets of a foreign state *itself*, notwithstanding the fact that the assets would not be covered by any relevant immunity exception in section 1610. Thus, panel rehearing may be warranted to clarify that the Court's opinion leaves that issue for another day.

Finally, we separately urge the panel to grant rehearing with respect to its discussion of California law. *See* Op. 16-17. As the United States has explained in other cases, and as the D.C. Circuit has expressly held, both TRIA and section 1610(g) only authorize plaintiffs to attach assets that are

"owned" by the relevant foreign state (or its agency or instrumentality). The panel's opinion did not dispute that point. But it treated as dispositive of the ownership issue the fact that attachment would have been authorized under California law. Because the two concepts are not the same, the Court should grant rehearing so that it can determine whether the assets at issue are owned by Bank Melli under the relevant source or sources of law.

BACKGROUND

1. Under the Foreign Sovereign Immunities Act (FSIA), a "foreign state" is generally immune from the jurisdiction of U.S. courts, *see* 28 U.S.C. § 1604, except as set out in the immunity exceptions in 28 U.S.C. §§ 1605-1607. And foreign state property is generally immune from attachment and execution, *see* 28 U.S.C. § 1609, subject to several exceptions codified at 28 U.S.C. § 1610.

Relevant here, section 1610(a) creates exceptions to immunity for certain "property in the United States of a foreign state . . . used for a commercial activity in the United States." 28 U.S.C. § 1610(a). Section 1610(b) creates exceptions to immunity for "any property in the United States of an agency or instrumentality of a foreign state engaged in a

commercial activity in the United States." *Id.* § 1610(b). Both subsections have specific provisions that, subject to these "commercial activity" requirements, authorize attachment by plaintiffs who hold judgments under the now-in-force 28 U.S.C. § 1605A, or the previously-in-force 28 U.S.C. § 1605(a)(7) (2006), both of which created exceptions to foreign sovereign immunity in certain terrorism cases. *See* 28 U.S.C. § 1610(a)(7), (b)(3).

Section 1610(g) contains further provisions applicable to individuals holding judgments under section 1605A. Section 1610(g) provides that for such judgment holders, "the property of a foreign state," as well as the "property of" its agency or instrumentality, "is subject to attachment in aid of execution, and execution, . . . as provided in this section." 28 U.S.C. § 1610(g). This directive applies even as to "property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." *Id.* And it applies "regardless of" five listed factors. *Id.*

Separately, the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (codified in relevant part at 28 U.S.C. § 1610 note) has provisions related to attachment. Section 201(a) of the statute provides that "[n]otwithstanding any other provision of law," certain

terrorism-related judgment holders may attach "the blocked assets of" certain foreign states, including the blocked assets of any of their agencies or instrumentalities. TRIA § 201(a). Generally speaking, "blocked" assets under TRIA include assets "seized or frozen by the United States" under specified statutory provisions. *See* TRIA § 201(d)(2).

2. This case involves four groups of creditors who hold judgments against Iran arising out of several different terrorist attacks. Op. 6. All four groups thereafter invoked TRIA and/or section 1610(g) to attach certain blocked funds held by defendants Visa and Franklin; those funds were allegedly "due and owing" to Bank Melli (an Iranian Bank whose stock is wholly owned by the Iranian government) by virtue of a contract stemming from the Bank's "commercial relationship" with Visa. ER 64; Pet. 5.

After Bank Melli unsuccessfully moved to dismiss the proceeding against it, this Court accepted an interlocutory appeal. The panel affirmed. Among other things, the panel held that the text of section 1610(g) "makes unmistakably clear" that it reaches the assets of a terrorist state's instrumentalities, even if that instrumentality is not an "alter ego" of the state. Op. 11. Additionally, while Bank Melli had argued against

attachment based on the idea that section 1610(g) was not a freestanding exception to sovereign immunity, and that no other portion of section 1610 authorized attachment against an instrumentality in this circumstance, the panel opinion stated that it found the Bank's argument problematic because it would read out of section 1610 its clear provisions subjecting instrumentalities to attachment notwithstanding their separate juridical status. Op. 12.

The panel opinion also rejected the Bank's argument that TRIA and section 1610(g) could not reach the assets in question because those assets were not "owned" by the Bank. In doing so, the panel did not take issue with the Bank's contention that TRIA and section 1610(g) both require ownership. Rather, the panel held that ownership must be determined with reference to California law, and then found that the plaintiffs could attach the assets in question because California law would permit a judgment creditor to attach such assets. Op. 16-17.

The Bank thereafter petitioned for rehearing and rehearing en banc.

DISCUSSION

The United States respectfully suggests that the Court deny the petition for en banc rehearing, but grant panel rehearing. Unlike the Bank,

we do not understand the panel to have actually held that section 1610(g) creates a freestanding immunity exception. Rather, in a case in which plaintiffs appear to satisfy the additional requirements of section 1610(b)—but for the separate juridical status of the Bank—the panel properly understood section 1610(g) to mean that the separate juridical status was irrelevant. To the extent the panel's opinion might be misinterpreted as holding something broader, that at most counsels that the Court grant panel rehearing to make the limits of its holding pellucid.

Additionally, we urge the panel to revisit its discussion of California law. As the panel properly did not dispute, both TRIA and section 1610(g) impose a federal requirement that the relevant foreign state (or its agency or instrumentality) "own" the targeted funds. The panel appears to have been under the mistaken impression, however, that anything attachable under California law is necessarily "owned" by the judgment debtor. Because the two concepts are distinct, the panel should grant rehearing to determine ownership under the relevant law.

1.a. Under the FSIA's baseline rule, "the property in the United States of a foreign state [is] immune from attachment . . . except as provided" elsewhere in the FSIA. 28 U.S.C. § 1609. Section 1610

nonetheless permits attachment in various circumstances, which generally require a sufficient nexus to "commercial activity" by the foreign state or its instrumentality. *See id.* § 1610(a), (b), (d).

The plain text of section 1610(g) then provides special provisions for certain terrorism cases, but still makes clear that its specified property is "subject to attachment . . . *as provided in this section*." 28 U.S.C. § 1610(g)(1) (emphasis added). The referenced "section" is section 1610, and thus section 1610(g) plainly incorporates by reference the other requirements for attaching foreign state property provided under section 1610. Accordingly, section 1610(g) is not a freestanding exception to immunity that can be invoked independent of the rest of section 1610.

Indeed, a broader understanding of section 1610(g) would violate the "cardinal principle of statutory construction" that a statute should be construed to avoid superfluity. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Both sections 1610(a)(7) and (b)(3), which specifically apply (*inter alia*) to terrorism-related judgments entered under 28 U.S.C. § 1605A, require some relation to commercial activity in the United States on the part of the foreign state's property, or by the foreign state's agency or instrumentality, as a condition of attachment of property in aid of execution. Section

1610(g), which also relates to a judgment under section 1605A, does not independently require that commercial nexus. Thus, reading section 1610(g) to be a freestanding immunity exception would render the restrictions in sections 1610(a)(7) and (b)(3) superfluous (in addition to rendering superfluous the "as provided in this section" language in section 1610(g)). That cannot be correct.

Nor is it the case that the government's interpretation deprives section 1610(g) of all meaning. What section 1610(g) adds is the special rule that certain plaintiffs with a judgment against a foreign state may pursue not only the assets of that state itself, but also "the property of an agency or instrumentality of" the state, "including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." 28 U.S.C. § 1610(g). Accordingly, section 1610(g) overrides various legal principles that might otherwise require respect for an entity's separate juridical status. *See, e.g.*, *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 628-34 (1983) (creating a multi-factor test for determining when a creditor can look to the assets of a separate juridical entity to satisfy a claim against a foreign sovereign under

the FSIA).[1] But that merely means that if a plaintiff covered by section 1610(g) wishes to attach the assets of a state agency or instrumentality, and the plaintiff can find an exception in section 1610 that would apply but for the fact that the plaintiff holds a judgment against the state itself—rather than an entity that would be considered legally distinct—the plaintiff would be able to proceed.[2]

This Court's decision in *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117 (9th Cir. 2010), is not to the contrary. In that case, which did not involve a proposed attachment under section 1610(g), this Court briefly stated in a footnote that section 1610(g) lets "judgment creditors . . . reach any U.S. property in which Iran has any interest." *Id.* at 1123 n.2. That

---

[1] Particularly in light of *Bancec*, we do not understand the Court's opinion to hold that sections 1610(a) and 1603(a), of their own accord, permit a judgment creditor to attach the assets of an instrumentality to satisfy a judgment against the foreign state itself.

[2] The Bank contends that section 1610(g) *only* overrides *Bancec*, and does not overcome other reasons (such as the Treaty of Amity) why an instrumentality's assets might be unavailable. We do not here address whether the Treaty of Amity covers the Bank in this circumstance, nor do we address whether section 1610(g) overrides any contrary treaty provisions. We note, however, that the United States has taken the position that at least certain kinds of government agencies and instrumentalities are neither "nationals" nor "companies" under the Treaty of Amity. *See* Brief for the United States as Amicus Curiae at 21-23, *Bank Markazi v. Peterson*, No. 14-770 (S. Ct.) (filed Aug. 19, 2015), *cert. granted* __ S. Ct. __ (Oct. 1, 2015).

footnote is dicta. *See, e.g.*, *In re Magnacom Wireless, LLC*, 503 F.3d 984, 993-94 (9th Cir. 2007) ("[S]tatements made in passing, without analysis, are not binding precedent."). And it certainly does not purport to address whether section 1610(g) is a freestanding exception to immunity wholly divorced from section 1610's other requirements.

Notably, if the allegations in this case are true, this would appear to be just such a case where the plaintiffs need not rely on section 1610(g) as a freestanding immunity exception. Section 1610(b)(3) allows individuals to attach "any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States," if they are seeking to satisfy certain terrorism-related judgments under the now-in-force section 1605A or the previously-in-force section 1605(a)(7). 28 U.S.C. § 1610(b)(3). Taking the complaint's allegations as true (which of course the Court must at this procedural posture) the property at issue is located in the United States, is alleged to be property of an Iranian agency or instrumentality engaged in commercial activity in the United States (*i.e.*, an entity that has contracted with Visa, an American company, to perform commercial services for that company), and the judgments sought to be enforced are section 1605A judgments. If these facts are established,

section 1610(b)(3) would apply but for the fact that the judgment is against Iran and the Bank would (possibly) be accorded juridical status separate from Iran itself. (It may also be the case that plaintiffs could be able to satisfy section 1610(a)(7) if the Bank's separate juridical status is disregarded, but that issue is more complicated and would require further analysis; as the United States has elsewhere explained, section 1610(a) requires that the property at issue must have been used for a commercial activity in the United States by the foreign state itself. *See* Br. for the United States as Amicus Curiae, at 14-21, *Rubin v. Islamic Republic of Iran*, No. 14-1935 (7th Cir., filed Nov. 3, 2014)).

b. Because this appears to be a case in which the assets *do* appear to meet the additional requirements set out in at least one of section 1610's other provisions (ignoring the separate juridical status issue), this case does not actually present the issue of whether section 1610(g) provides a freestanding exception to immunity. Accordingly, we understand any contrary language in the panel's opinion to be dicta that leaves open in this Circuit the distinct question of whether a plaintiff can proceed under section 1610(g), even after ignoring the separate juridical status of an agency or instrumentality, if the plaintiff still cannot meet any of the

immunity exceptions in section 1610. We thus see no need in this case for rehearing en banc. Nor do we see the panel's decision as foreclosing in this Circuit the positions we took in our filings in *Rubin v. Islamic Republic of Iran*, No. 14-1935 (7th Cir.), *Ministry of Defense v. Frym*, No. 13-57182 (9th Cir.), and *Hegna v. Islamic Republic of Iran*, No. 11-1582 (2d Cir.), as all of those cases presented the question whether a plaintiff could invoke section 1610(g) without showing the requisite relation to commercial activity in the United States (by the relevant actor) set out in either section 1610(a)(7) or section 1610(b)(3).

We note that some language on page 12 of the panel's opinion might be read as addressing more than the issue that was before the Court. Indeed, the plaintiffs in the *Rubin* case have already cited the panel's opinion (in a Rule 28(j) letter) for the proposition that section 1610(g) allows them to attach assets of the foreign state itself, to satisfy a judgment against that state, even if the assets would otherwise be outside the scope of section 1610(a)(7) because they had not been used in commercial activity. Those same plaintiffs are also parties to the pending *Frym* case in this Circuit. Thus, to avoid confusion, we urge the panel to amend its opinion to clarify the limitations of its holding.

2. Separately, we urge the panel to grant rehearing with regard to its discussion of California law.

a. The Bank contended, and this Court did not dispute, that both TRIA and section 1610(g) only reach assets that are actually owned by the terrorist state or its agency or instrumentality. That was the D.C. Circuit's express holding in *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 938-40 (D.C. Cir. 2013).[3] TRIA authorizes attachment against "the blocked assets *of* [a] terrorist party (including the blocked assets *of* any agency or instrumentality of that terrorist party)." TRIA § 201(a) (emphases added). Section 1610(g) similarly applies to the property "of" a foreign state or "of" its agency or instrumentality. 28 U.S.C. § 1610(g).

The assets "of" an entity are not naturally understood to include all assets in which it has any interest of any nature whatsoever. Rather, the Supreme Court has repeatedly observed that the "use of the word 'of' denotes ownership." *Board of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2196 (2011) (quoting *Poe v. Seaborn*, 282

[3] *But cf. Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 1001-02 (2d Cir. 2014) (finding that section 1610(g) "is silent as to what interest in property the foreign state, or instrumentality thereof, must have in order for that property to be subject to execution," and ultimately looking at New York property law).

U.S. 101, 109 (1930)); *see also id.* at 2196 (describing *Flores–Figueroa v. United States*, 556 U.S. 646, 648, 657 (2009), as treating the phrase "identification [papers] of another person" as meaning such items belonging to another person (brackets in original)); *Ellis v. United States*, 206 U.S. 246, 259 (1907) (interpreting the phrase "works of the United States" to mean "works belonging to the United States").

Applying that understanding of "of" to a disputed provision of patent law, the Court in *Stanford* concluded that "invention owned by the contractor" or "invention belonging to the contractor" are natural readings of the phrase "'invention of the contractor.'" 131 S. Ct. at 2196. In contrast, in *United States v. Rodgers*, 461 U.S. 677 (1983), the Court held that the IRS could execute against property in which a tax delinquent had only a partial interest when the relevant statute permitted execution with respect to "any property, of whatever nature, *of* the delinquent, *or in which* he has any right, title, or interest." 26 U.S.C. § 7403(a) (emphases added); *see also Rodgers*, 461 U.S. at 692-94. The Court found it important that the statute explicitly applied not only to the property "of the delinquent," but also specifically referred to property in which the delinquent "has any right, title, or interest." *See Rodgers*, 461 U.S. at 692 (emphasis removed). TRIA and

section 1610(g) omit that additional phrase; the former only applies to the blocked assets "of" a terrorist party, *see* TRIA § 201(a), and the latter only applies to the property "of" a terrorist state, *see* 28 U.S.C. § 1610(g)(1).

Indeed, extending these statutes beyond ownership would expand these statutes well beyond common law execution principles. It "is basic in the common law that a lienholder enjoys rights in property no greater than those of the debtor himself; . . . the lienholder does no more than step into the debtor's shoes." *Rodgers*, 461 U.S. at 713 (Blackmun, J., concurring in part and dissenting in part); *see also id.* at 702 (majority op.) (implicitly agreeing with this description of the traditional common law rule); 50 C.J.S. Judgments § 787 (2015). Congress enacted TRIA and section 1610(g) against the background of these principles, and the statutes should be interpreted consistent with those common-law precepts. *See Staples v. United States*, 511 U.S. 600, 605 (1994); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-10 (1991).

Nor would it make sense to expand the statutes beyond ownership. Allowing the victims of terrorism to satisfy judgments against the property of a terrorist party "impose[s] a heavy cost on those" who aid and abet terrorists. 148 Cong. Rec. S11527 (daily ed. Nov. 19, 2002) (statement of

Sen. Harkin, discussing TRIA). Paying judgments from assets that are *not* owned by the terrorist party would not serve that goal.

b. Despite the fact that the panel opinion took issue with none of the above, the panel treated as dispositive the fact that California law would allow a judgment creditor to reach assets owed to a debtor. Op. 17. But the mere fact that state law authorizes attachment is insufficient. As explained above, federal law has an affirmative requirement that the assets actually be *owned* by the debtor state or instrumentality. Thus if a state decided (for example) that judgment creditors could obtain assets wholly owned by third parties, that state determination would be contrary to federal law in this context and without effect.

That rule is fully in accord with his Court's decision in *Peterson*. *Peterson* itself recognized that state law on the enforcement of judgments only applies insofar as it does not conflict with federal law. *See* 627 F.3d at 1130. And while the Court in dicta stated that "[t]he FSIA does not provide methods for the enforcement of judgments against foreign states," *id.*, the case did not address the interpretative question at issue here, nor did it even involve a proposed execution under either TRIA or section 1610(g).

Furthermore, the same sentence in *Peterson* went on to acknowledge that the FSIA controls whether or not specifically targeted properties are immune. *Peterson*, 627 F.3d at 1130. Thus, despite the fact that California law apparently allowed the property in question there to be attached, the Court nonetheless held that the property was immune because the FSIA provision invoked there only applied to property located in the United States, which the asset in question was not. *Id.* at 1130-32. While the Court may have used state law to determine the property's location, federal law dictated the relevant question.

Here, as explained above, TRIA and section 1610(g) only apply insofar as the targeted property is owned by Iran or one of its agencies or instrumentalities. Thus, even assuming that ownership can be determined under state law rather than federal law,[4] the relevant state law must be actually addressed to that question; the mere fact that state law makes the asset attachable is insufficient. Accordingly, the Court should grant

[4] In *Heiser*, the D.C. Circuit understood TRIA and section 1610(g) as creating a federal definition of ownership, with the content of that definition to be filled in by the judiciary. *Heiser*, 735 F.3d at 940. The United States takes no position on whether ownership is to be determined using such federal law, or if state law may instead provide that definition.

rehearing in order to determine, under the relevant source of law, whether Bank Melli is the owner of the assets in question here.

CONCLUSION

For the reasons discussed above, the Court should deny rehearing en banc, but grant panel rehearing.

Respectfully submitted,

Of Counsel:

LISA J. GROSH
Assistant Legal Advisor
Department of State

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

BRIAN STRETCH
Acting United States Attorney

SHARON SWINGLE
(202) 353-2689
/s/ Benjamin M. Shultz
BENJAMIN M. SHULTZ
(202) 514-3518
Attorneys, Appellate Staff
Civil Division, Room 7211
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Benjamin.Shultz@usdoj.gov

October 23, 2015

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Book Antiqua, a proportionally spaced font.

I further certify that this brief complies with the Court's order because it contains **3946 words**, excluding the parts of the brief exempted under Rule 32, according to the count of Microsoft Word.

/s/ Benjamin M. Shultz
BENJAMIN M. SHULTZ

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which constitutes service on all parties under the Court's rules because all participants in the case are registered CM/ECF users..

/s/ Benjamin M. Shultz
BENJAMIN M. SHULTZ